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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:

Petition to Amend Rule 39(b) of the
Arizona Rules of Criminal Procedure

No. R-14-0022

**COMMENT OF THE MARICOPA
COUNTY PUBLIC DEFENDER'S
OFFICE REGARDING PETITION
TO AMEND RULE 39(B) OF
ARIZONA RULES OF CRIMINAL
PROCEDURE**

Pursuant to Rule 28 of the Arizona Rules of Supreme Court, the Maricopa County Public Defender's Office ("MCPD") submits the following comment to the above-referenced petition.

MCPD is the largest indigent defense law firm in the State of Arizona with over 200 deputy public defenders providing indigent legal services in the Maricopa County Justice and Superior Courts. During the past fiscal year, the MCPD handled almost 36,000 criminal cases.

DISCUSSION

The MCPD opposes the rule change, as proposed. However, in light of the recent amendment to A.R.S. § 13-4434 and the understandable goals of protecting

victim information from general public access, MCPD believes an alternative modification would address the concerns of prosecuting agencies and alleged victims while preserving the rights of criminal defendants to conduct investigation.

I. The rule change, as currently proposed, will violate defendant rights, interfere with the ability of attorneys to comply with the ethical rules, and will interfere with MCPD's ability to efficiently conduct conflicts checks.

MCPD opposes the current proposed rule change for two primary reasons. First, the proposed rule change, in conjunction with other changes made to A.R.S. § 13-4434, creates an unconstitutional scheme which interferes with the ability of all defendants to conduct independent investigation, confront and cross-examine accusers, and present a full and complete defense. The proposed rule change also interferes with the rights of all defendants to effective assistance of counsel. Related to a defendant's right to effective assistance of counsel, the proposed rule change interferes with the ability of attorneys employed by MCPD to comply with the ethical duty to provide competent counsel. Finally, under the proposed rule change conflicts checks will become inefficient, costly, and cumbersome.

A. The proposed rule change creates an unconstitutional scheme.

The rule change enacted on an emergency basis by this Court mirrors the legislative changes to A.R.S. § 13-4434. The changes to this Rule and § 13-4434 taken together render the Victim's Bill of Rights ("VBR") unconstitutional due to

the interference with the rights of all defendants to due process and effective assistance of counsel.

1. The new rule change interferes with the due process rights of all defendants to present a complete defense.

The constitutional right to due process guarantees a criminal defendant "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). This Court has held that the exclusion of essential evidence, which thereby precludes a defendant from presenting a theory of defense, results in a denial of the defendant's right to due process that is not harmless. *Oshrin v. Coulter*, 142 Ariz. 109, 111, 688 P.2d 1001, 1003 (1984); *see also State ex rel. Romley v. Superior Court (Roper)*, 172 Ariz. 232, 236, 836 P.2d 445, 450 (App. 1992).

Defendants must have the ability to obtain information pertaining to the background of witnesses so that defendants can offer any relevant information. *See Alford v. United States*, 282 U.S. 687 (1931). *Alford* held:

[Cross-examination's] permissible purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood, that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment, and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased.

Id. at 691. "When the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives." *Smith v. Illinois*, 390 U.S. 129, 131 (1968). "The witness' name and address open countless avenues of in-court examination and out-of-court investigation." *Id.* "To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself." *Id.*

A defendant's ability to present a complete defense presupposes the defendant's ability to investigate into the circumstances and background of the offense and the witnesses. A defendant who is never able to investigate the background of a witness will never be able to offer any such information as part of a defense. Forcing a defendant to trial or to enter a plea without knowing the identity of the accuser deprives that defendant of the right to investigate the victim's account of events, find witnesses not interviewed by the police, and to investigate a number of defenses, including factual impossibility, mistake of fact, or alibi. Thus, because the proposed rule change interferes with Defendant's ability to investigate and collect evidence which would be part of a complete defense, the proposed Rule change interferes with Defendant's ability to present a complete defense.

2. The proposed rule change interferes with the constitutional right to effective assistance of counsel.

The proposed rule change also interferes with a defendant's right to the effective assistance of counsel. The ability of defense counsel to render competent, constitutionally effective advice to a defendant about potential legal issues, motions, and trial issues is contingent on counsel having basic, essential information including birth dates to identify the defendant's accuser.

The right to counsel includes the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). "The constitutional guarantee [to the effective assistance of competent counsel] applies to pretrial critical stages . . . in which defendants cannot be presumed to make critical decisions without counsel's advice." *Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376, 1384, 1385 (2012); *see also Rivera-Longoria v. Slayton ex. rel. County of Coconino*, 228 Ariz. 156, 159, ¶ 13, 264 P.3d 866, 869 (2011) (stating the general purpose of disclosure rules is to "ensure that, once charges have been filed in superior court, basic discovery will be provided to the defense sufficiently in advance of a plea deadline to allow an informed decision on the offer with effective assistance of counsel" (emphasis added)). "Anything less might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him." *Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399, 1408 (2012) (internal citations and quotations omitted).

The right to effective assistance of counsel hinges upon counsel's ability to investigate alleged victims and witnesses. The Arizona Court of Appeals has succinctly held, "The right to counsel is an extension of the doctrine that defendants have the right to gather independent exculpatory evidence." *State v. Transon*, 186 Ariz. 482, 485, 924 P.2d 486, 489 (App. 1996). Prohibiting an attorney's access to identifying information prevents the Defendant from knowing the identity of his accuser (which is required by the 5th and 6th Amendment rights to due process and confrontation) and denies the Defendant any ability to investigate the credibility of the victim. Credibility must be investigated in at least two parts: whether there is any information in the victim's past that could be used for impeachment and whether information from the location of the offense supports the victim's or other witnesses' version of events. Such investigation is fundamental to preserving the Defendant's other constitutional rights.

B. The rule change, as currently proposed, renders defense attorneys unable to comply with ethical duties because attorneys cannot conduct necessary factual investigation.

Because MCPD is one of the largest employers of criminal defense attorneys, MCPD is particularly concerned with ensuring every employed attorney is capable of complying with the ethical requirements set forth by this Court. However, the proposed Rule change will codify a scenario under which this office

will not be able to guarantee attorneys have all the tools necessary to comply with the most basic ethical precept: competence.

Attorneys must act ethically. This requires attorneys to comport behavior to the Rules of Professional Conduct. At the most basic level, attorneys must be competent. Ariz. R. Sup. Ct. R. 42, E.R. 1.1. "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for representation." *Id.* (emphasis added). The comments provide more insight:

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible.

Id. at cmt. [5] (emphasis added). The ethical rules plainly require attorneys to investigate and analyze factual issues. Further bolstering this point, the American Bar Association has noted the importance of independent investigation:

Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's

admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

See ABA Standards for Criminal Justice: Prosecution and Defense Function, Standard 4-4.1(a) (emphasis added) (Defense Function standards available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_dfunc_blk.html).

Since the MCAO implemented a policy requiring the unilateral redaction of identifying information approximately one year ago, attorneys at the MCPD have often struggled to competently represent defendants. Interference with the ability to conduct investigation has resulted in questionable results. Some examples would best illustrate this point.

In *State v. Manuel Moreno*, Maricopa County Superior Court CR 2013-112114-001, an attorney represented a client charged with Aggravated Robbery, Kidnapping, and Burglary in the 2nd Degree. The attorney never received the birth date of the victim, but the attorney attempted to conduct an independent investigation of the victim's background using only his usual name (RLA). The defense attorney found a prior felony conviction within Maricopa County for a RLA, and the attorney filed a motion requesting to use the prior felony conviction to impeach the victim. The State did not file a response and the parties litigated the motion prior to the start of trial. The State never notified the defense attorney that

the DOB on the prior conviction did not match her victim's DOB. Rather, the State simply asked the court to sanitize the prior felony conviction.

At trial, the defense attorney began to cross-examine the victim on his prior conviction. The victim asserted he did not have a prior conviction. The defense attorney tried again to reframe the conviction to communicate the same point. Again, this attempt was unsuccessful. A recess was held, and the parties learned the victim did not have a prior conviction. The prosecutor had apparently never looked at the victim's birth date either, because the disclosed prior conviction regarded a completely different person. Mr. Moreno was unable to independently verify the victim's criminal history. Instead, Mr. Moreno relied upon the uncontested prior conviction which the defense disclosed to the State. The Defendant's uncontested belief that the victim had a prior felony conviction weighed heavily in deciding whether to proceed to trial or accept a favorable plea. The defense attorney was rendered unable to fully advise Mr. Moreno because the defense attorney could not independently investigate the victim's background and confirm the prior convictions.

C. The currently proposed rule change imposes unnecessary burdens in conducting conflicts checks because birth dates are used to evaluate conflicts.

"The guarantees of the Sixth Amendment include the right to an attorney with undivided loyalty. Counsel must be free to zealously defend the accused in a

conflict-free environment." *Romley v. Schneider*, 202 Ariz. 362, 363-64, ¶ 6, 45 P.3d 685, 686-87 (App. 2002). "It is certain that a percentage of cases assigned to the public defender will involve conflicts of interest. Those conflicts should be discovered immediately, for they will come out inevitably. The earlier a conflict of interest is discovered and dealt with, the less damage it can do." *Maricopa Cty. Public Defender's Office v. Superior Court*, 187 Ariz. 162, 927 P.2d 822, *rev. denied* (1996) (emphasis added).

The name and date of birth of alleged victims, witnesses, clients, and other individuals involved in a criminal case are the primary identifiers used by the MCPD and other indigent defense agencies to conduct conflicts checks prior to commencement of representation. The indigent defense agencies have spent years developing a confidential database that requires both a name and date of birth to effectively sort and identify the tens of thousands of names contained within. The system allows indigent defense attorneys to readily determine if representation of a client will conflict with current or former representation of another client. Over the course of the last year, however, the individual policy of the Maricopa County Attorney's Office has resulted in several problems in the identification of potential conflicts. This has been particularly troublesome in capital cases.

Attached with this Comment is an affidavit from Kathleen Tomaiko, an investigator with MCPD. Ms. Tomaiko explains the process used in MCPD for

conducting a conflict check and the impact experienced when there is no birth date provided. The impact is three-fold: time, money, and certainty. Whenever a birth date is not provided, a conflict check takes, on average, two to three times longer to conduct. This calculation considers only the time taken to actually conduct the conflict check. This calculation does not consider expected litigation in every case regarding the disclosure of birth dates. Because more time is expended in every case, the two consequences are either a necessary office-wide caseload reduction (to ensure attorneys and staff can adequately represent defendants) or increased expenditures. Second, there are two fiscal impacts. Foremost, the average cost per case will increase. This will be done either through a necessary decrease in office caseload to ensure the present rate of hours can accommodate the increased work load (decreased caseload for same cost), or more human hours will have to be consumed to accommodate the present caseload (same caseload for increased cost). In either case, there is also the possibility of increased reliance upon paid resources such as Lexis for conducting background checks which was previously unnecessary. Finally, there will be a decreased level of certainty. As Ms. Tomaiko made clear, there will be a number of instances when investigators and attorneys will not be able to reach a level of certainty regarding prior representation. This will increase withdrawal rates, thereby further delaying cases.

D. The ability to request disclosure does not remedy the constitutional violations. At best, the scheme merely creates an unnecessary administrative hurdle that must be jumped in every case with an alleged victim.

The rule, as proposed, allows a trial court to order the disclosure of redacted information “for good cause shown by the defendant.” This allowance, however, does not resolve the constitutional violations. This new rule scheme shifts the burden to defendants and places the proverbial cart before the horse. Without a date of birth, defendants cannot establish what evidence would be discovered. Put more simply, the proposed rule expects defendants to show “good cause” to obtain a birth date, but the only way to establish good cause would be to have already conducted investigation. Such an investigation is not possible without a birth date. Any suggestion that investigation could be done with just the name should be dismissed. Such a position would require a defendant to research every person sharing the alleged victim’s name and collect all possible impeachment on every single person with the name. This would severely tax the resources of every defense organization.

The alternative would impose a burdensome administrative hurdle upon the trial courts. Because of the constitutional importance of investigation, “good cause” would exist in every case where there is an alleged victim. Such an interpretation would require the attorney in every case with an alleged victim to file a motion asking for the birth dates. The trial court would then have to grant

every motion by minute entry. The State would then have to disclose the information after the trial court's order. While such a process exists with other forms of evidence (for example, 911 calls), the burden is imposed less frequently. Such a process in every case with an alleged victim would be a waste of resources. This would be especially burdensome in cases where conflicts are possible. While this administrative process is ongoing, defense attorneys would be assigned and actively representing defendants when a conflict might exist. Thus, the process would create a delay in the identification of conflicts, prolong improper representation, postpone the filing of a motion to withdraw, and ultimately risk a defendant's right to a speedy trial or expeditious resolution.

II. MCPD proposes an alternative amendment which will adequately protect alleged victims and defendants

In light of the problems addressed above, MCPD proposes the following amendment:

10. The right to require the prosecutor to withhold, during discovery and other proceedings, the victim's date of birth, social security number, official state- or government-issued driver license or identification number, home address, and telephone number of the victim, e-mail address, the address and telephone number of the victim's place of employment, and the name of the victim's employer. Any information withheld pursuant to this subsection shall be provided to defense counsel. Defense counsel shall not disclose such information to any person other than counsel's staff and designated investigator, and shall not convey the information to the defendant, without previous authorization from the court. ~~provided, however, that for good cause shown by the defendant, the court may order that such information be disclosed to defense counsel and may impose such~~

~~further restrictions as are appropriate, including a provision that the information shall not be disclosed by counsel to any person other than counsel's staff and designated investigator and shall not be conveyed to the defendant.¹~~

The change proposed herein would ensure that identifying and locating information for alleged victims does not come into the possession of defendants without authorization of the courts. At the same time, the proposed rule change recognizes the need for the information for the purposes of guaranteeing defendants the ability to conduct an independent investigation and enables defense attorneys to comply with the ethical duties to investigate the factual background of a case. Moreover, the change proposed herein recognizes the inherently different role played by defense attorneys and the private nature of the discovery process.

The alternative proposed herein, satisfies the Due Process clause concerns because the alternative ensures the information is still disclosed to defense counsel so that defense counsel can conduct necessary investigation into the backgrounds of alleged victims. The alternative also avoids infirmities related to a defendant's right to effective assistance of counsel. While defendants will not personally have access to the information, the proposed alternative ensures that attorneys will receive the information. Thus, attorneys will still be able to conduct necessary investigation. The alternative also requires prosecutors to provide redacted

¹ The changes proposed by this Court are reflected by single underline and ~~single strikethrough~~. The MCPD proposes the additional changes reflected by double underline and ~~double strikethrough~~.

information immediately, thereby ensuring there are no delays in the investigation. Moreover, under the alternative proposed by MCPD, attorneys will still be able to abide by the ethical rules. Attorneys will have the tools necessary to conduct background investigation and will be equipped to advise and represent criminal defendants. The MCPD alternative also ensures that conflict checks can be done quickly and efficiently. The proposed alternative automatically requires the information be provided to defense counsel thereby avoiding unnecessary delays in identifying conflicts and minimizing late withdrawals. This mechanism also avoids any increased burden placed on the parties or courts unless a defense attorney wants to provide the information to the defendant.

This alternative is also consistent with the change to A.R.S. § 13-4434(B). Subsection (B) allows for the redaction of information in discovery “disclosed to the defendant.” The alternative proposed herein ensures that redacted information is provided separately to the attorney and is not given to the defendant without authorization from the trial court. The statute does not seek to prohibit attorneys—officers of the court—from having this information; the statute seeks to prevent defendant access to identifying information. The alternative proposed by MCPD appropriately balances both interests. Defense attorneys will have access to the information and thus will be able to adequately investigate the case, present a complete defense, and provide competent counsel. At the same time, defendants

will not have access to identifying information unless the trial court finds good cause and enters an order allowing defense counsel to provide the information to defendants.

Finally, the alternative proposed herein also ensures that protected information will not be disclosed without prior approval from the court. This would include disclosure to the defendant, as well as disclosure to any other person other than staff and a designated investigator.

III. Conclusion

The goals of the proposed rule change are understandable. However, as the proposed rule change currently stands, the rule change would interfere with the ability of every defense counsel to provide the type of representation required by the United States and Arizona Constitutions and Arizona's Rules of Professional Conduct. The alternative proposed herein, however, strikes an appropriate balance. Alleged victims will be able to require prosecuting agencies to redact identifying information and defendants will not receive the information without prior leave from the court. At the same time, attorneys will be able to conduct independent investigations on behalf of defendants, adequately represent defendants during criminal cases, comply with the ethical duties imposed upon them, and ensure conflict free representation. All this will be accomplished while

ensuring the protected information is shared only with staff and a designated investigator.

In the absence of the additional changes proposed herein, this rule change carries detrimental impacts on defendant rights, the ability of attorneys to comport to the ethical rules, and the expedient administration of justice. Without the further modifications proposed herein, the Maricopa County Public Defender's Office opposes the proposed rule change.

RESPECTFULLY SUBMITTED this 18th day of September, 2014.

MARICOPA COUNTY PUBLIC
DEFENDER'S OFFICE

By /s/ Mikel Steinfeld
MIKEL STEINFELD
AZ Bar No. 024996

Electronic copy filed with the
Clerk of Supreme Court of Arizona
this 18th day of September, 2014.

By /s/ Mikel Steinfeld
MIKEL STEINFELD

AFFIDAVIT

STATE OF ARIZONA)
)ss.
County of Maricopa)

Kathleen Tomaiko, being duly sworn upon her oath, deposes and states:

- 1) I am presently an investigator with the Maricopa County Public Defender's Office.

Before joining the Public Defender's Office, I held multiple investigative positions.

I was a member of the Military Police with the Army for three years, a private investigator for two years, an Officer with the Casa Grande Police Department for three years, an Officer with the Adult Probation Department for more than twenty years, and an Investigator with Child Protective Services for three and a half years. Identifying and locating people has been a component in much of my professional history. With Child Protective Services in particular, I was often tasked with locating a child's parents, grand-parents, aunts, uncles, cousins, and more extended family members.

- 2) Within the Maricopa County Public Defender's Office, one of the duties assigned to investigators is to conduct all initial conflict checks.

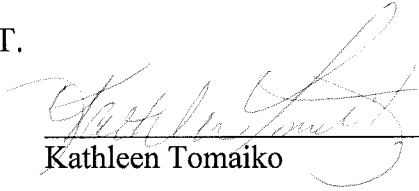
- 3) When a date of birth is provided, the process for conducting a conflict check is as follows:

- a) The investigator runs all pertinent names through the JUSTWARE database maintained by the Office of Public Defense Services.

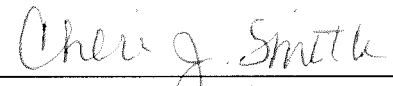
- b) The investigator uses the date of birth to determine if the office has had prior contact with the person. This includes when the office has previously represented the person or the person is or has been a witness in other cases.
 - c) Where dates of birth do not match, a possible match is not noted unless there are particular reasons to pull the file (for example, the birth dates are close to a match and inconsistency might be due to a typo or transposed dates).
 - d) With a birth date, this process takes less than an hour.
 - e) Where birth dates match (or where there is a possible match), the assigned attorney is notified.
 - f) The assigned attorney then reviews the previous files to determine if a conflict exists.
- 4) When there is no birth date, the process for conflict checks is as follows:
- a) The investigator runs all pertinent names through the JUSTWARE database maintained by the Office of Public Defense Services.
 - b) Such a process will often reveal several possible matches.
 - c) An investigator would then attempt to uncover additional identifying information in order to determine if a match exists. Such additional identifying information could include:
 - d) Height, weight, or other physical descriptors of an alleged victim.
 - e) Age ranges of an alleged victim.
 - f) Parents, siblings, or other family members of an alleged victim.
 - g) Such a process often will not eliminate a large portion of possible conflicts.

- h) The investigator then notifies the attorney of all the possible conflicts.
- i) Without a birth date, this process can often take two to six hours.
- j) Without a birth date, this process will often fail to resolve the question of whether a conflict exists.
- k) The assigned attorney will then review each of the previous files, for all possible conflicts, to determine if a conflict exists.

FURTHER, AFFIANT SAYETH NOT.


Kathleen Tomaiko

SUBSCRIBED AND SWORN to before me this 11th day of September, 2014.


NOTARY PUBLIC

My Commission Expires:

April 12, 2016

